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Before the
Federal Communications Commission
Washington, DC 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment of Part 1 of the Commission's)
Rules – Competitive Bidding Procedures)
)
Petition for Reconsideration of Waiver Conditions)
of Cable & Communications Corporation,)
Northeast Nebraska Telephone Company, and)
Poka Lambro Telecommunications, Ltd.)

WT Docket No. 97-82

To: The Commission

PETITION FOR RECONSIDERATION

Cable & Communications Corporation (“C&CC”), Northeast Nebraska Telephone Company (“Northeast”) and Poka Lambro Telecommunications, Ltd. (“Poka Lambro”) (collectively, “Petitioners”),¹ by counsel and pursuant to Section 1.106 of the Commission’s Rules, each seek the Commission’s reconsideration of a condition associated with grant² of their respective individual requests for waiver of Section

¹ Cable & Communications Corporation is a wholly-owned subsidiary of Mid-Rivers Telephone Cooperative, Inc. Poka Lambro Telecommunications, Ltd. is a wholly-owned subsidiary of Poka Lambro Telephone Cooperative, Inc.

² Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, WT Docket No. 97-82. *Second Order on Reconsideration of the third Report and Order and Order on Reconsideration of the Fifth Report and Order*, FCC 03-98 (rel. May 8, 2003) (the “Order”). Petitioners’ pending requests for waiver of the attribution rules were granted by the Order (*see id.*, paras. 19 and 57), subject to Petitioners’ “compliance with the factors adopted” in the Order as eligibility criteria for the exemption to the attribution rules adopted in the Order. Although the grant of Petitioners’ waiver request occurred in the context of a rulemaking proceeding, Petitioners file the instant request for reconsideration within the thirty-day window initiated by release of the Order to ensure the timeliness of their reconsideration request. *See* 47 C.F.R. § 1.4(b)(2).

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1.2110(c)(2)(ii)(F) of the Commission's Rules.³ Specifically, Petitioners seek reconsideration of the Commission's application of the federal tax code as a condition of granting Petitioners' pending waiver requests. The year-to-year tax treatment of a Cooperative's non-member service revenues is wholly unrelated to the fact that it is not in the public interest to attribute the revenues of its Board members and officers to the cooperative itself. Each Petitioner (or its parent) is, and has long been known to the Commission as, a rural telephone company and a *bona fide* cooperative. Accordingly, the Commission and public are assured that the underlying purpose of the attribution rules⁴ would be served without consideration of tax code limitations.⁵

I. Background

Each Petitioner (or its parent) is a rural telephone cooperative. In applying to participate in Auction No. 44, each Petitioner sought waiver of the attribution rule requiring that the financial interests of officers and directors be included in the calculation of eligibility for bidding credits.⁶ Petitioners demonstrated that grant of the

³ Each Petitioner filed a request for waiver of the attribution rule to permit it to exclude the financial interests of officers and directors from bid credit eligibility calculations. The Petitioners based these requests on, *inter alia*, the distinctive structure and governance of community-owned cooperative rural telephone companies, which have no access to the financial wherewithal of their officers and directors. These requests were filed on or before May 8, 2002 as part of Petitioners' respective short form applications for participation in Auction No. 44, and also were included in Petitioners' respective long form applications.

⁴ The Commission stated that the "attribution rules are intended to eliminate incentives for entities to create small business 'fronts' that would enable large firms to secure a benefit to which they are not entitled., *i.e.*, small business bidding credits." *Order* at para. 15 (citation omitted).

⁵ While the instant Petition is confined to a request for reconsideration of the Commission's decision as it affects the specific waiver requests at issue, Petitioners respectfully urge a general review of the necessity and efficacy of a tax-based limitation, submitting that this criterion is overbroad and unrelated to the purpose it supposedly serves – precluding the formation of "sham" applicants. *See infra* n. 10. Petitioners respectfully submit that the year-to-year treatment of non-member revenues is not related to the control and attribution issues with which the Commission is properly concerned.

⁶ 47 C.F.R. § 1.2110(c)(2)(ii)(F).

waiver would be in the public interest by allowing small rural telephone cooperatives a more meaningful opportunity to participate in spectrum auctions. Rural telephone cooperatives, unlike common stock companies, are owned and controlled by member-subscribers, who elect a board of directors, each member of which has no greater financial stake in the cooperative's business than any other owner/member. Furthermore, the financial wherewithal of officers and directors is not available to the cooperative. Day-to-day operations are under the control of a manager. Accordingly, Petitioners submitted, waiver of the rule requiring that the applicant include the gross revenues of directors' and officers' outside business interests is appropriate because adherence would frustrate the purpose of the rules themselves.

**II. A Cooperative's Legitimacy Is Not Dependent On Its Tax Status;
Member Revenues of Legitimate Telephone Cooperatives Are Not
Taxable**

In addressing the general question of the fairness and efficacy of applying Section 1.2110(c)(2)(ii)(F) of the Commission's rules to rural telephone cooperatives,⁷ the *Order* acknowledges that rural telephone cooperatives are distinctive entities, and, accordingly, entitled to regulatory treatment commensurate with that recognition. The Commission establishes a limited exemption from the requirement that the gross revenues of entities controlled by the officers and directors of rural telephone cooperatives be attributed to the cooperative (and its subsidiaries) for the purpose of determining eligibility for bidding credits. Recognizing "the unique nature of rural telephone cooperatives,"⁸ the

⁷ See Petition for Reconsideration of the Rural Telecommunications Group, WT Docket No. 97082, filed September 28, 2000.

⁸ *Order* at para. 15.

Commission determined that rural telephone cooperatives and their subsidiaries will not be charged with officers' and directors' financial holdings if

(1) the applicant (or the controlling interest) is validly organized as a cooperative pursuant to state law; (2) the applicant (or the controlling interest) is a "rural telephone company" as defined by the Communications Act; and (3) the applicant (or the controlling interest) is eligible for tax-exempt status under the Internal Revenue Code.⁹

While most of each Petitioner's revenues remain member-source income, and, therefore, are not taxed, none of the Petitioners currently do meet the third criteria.¹⁰ Under the newly-adopted provisions, each Petitioner otherwise would fully qualify for the exemption.¹¹ Grant of Petitioners' request will, therefore, serve the public interest and the underlying policy goals recognized by the Commission.

Northeast is a validly organized cooperative operating in Nebraska. Poka Lambro's parent, Poka Lambro Telephone Cooperative, Inc., is a validly organized cooperative in the state of Texas, and C&CC's parent, Mid-Rivers Telephone Cooperative, Inc., is a validly organized cooperative in the state of Montana. These three cooperatives, with more than 150 years of cooperative history among them, have provided service to their communities, led by non-salaried directors, elected by the cooperatives'

⁹ *Id.* at para. 16 (citations omitted). The *Order* defines "eligibility for tax-exempt status" as requiring that "85 percent or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses." *Order* at n. 70 (citations omitted). Many of the approximately 250 telephone cooperatives do not meet the 85% income test in any given year, resulting in the taxation of all income not allocated as patronage credits (as opposed to the non-taxable treatment that non-member income receives when a cooperative meets the 85/15 test). Regardless of whether all income is exempt from tax, or the cooperative is allowed to exclude patronage credits from income, the Internal Revenue Service requires strict compliance with the common law characteristics of a cooperative.

¹⁰ Eligibility for tax-exempt status is an annual determination based, *inter alia*, upon the income position of the cooperative at the end of each fiscal year. Although some cooperatives may be able to project their "tax status," only end-of-year accounting provides definitive answers, and that status may fluctuate.

¹¹ The day-to-day control of each Petitioner is vested in its General Manager. See FCC Forms 175 filed by each Petitioner, available at <http://auctionfiling.fcc.gov/gorm175/index.htm>.

member/owners, who appoint non-salaried officers.¹² In addition, each Petitioner qualifies as a “rural telephone company,” as that term is defined by the Act. Without question, Petitioners are, by all objective criteria, “*bona fide* community-based cooperatives [providing rural telephone service], not sham entities.”¹³

Just as each Petitioner’s status as a rural telephone company is an established fact, the Petitioners’ cooperative status is derived from a set of distinct and established organizational, governance and policy criteria.¹⁴ Against this objective and demonstrable factual basis, it would be inappropriate for current tax treatment of non-member revenues,¹⁵ a fluctuating target that focuses on business conditions, to undermine the policy objective of encouraging small business participation in wireless endeavors, or inadvertently frustrate the administrative concerns regarding sham applicants by erecting an obstacle to legitimate cooperatives.

Petitioners respectfully submit that current tax treatment of non-member revenues is superfluous to the definition of rural telephone cooperatives when the remaining criteria clearly and objectively establish eligibility for the attribution exemption created under the *Order*. As demonstrated above, an ephemeral revenue-based classification is

¹² *Id.*

¹³ *Order* at para. 17. Information submitted with the waiver requests demonstrates that each Petitioner is a substantial organization with assets and employees in their respective service areas and has been in operation for an extended period. There can be no question that any of the Petitioners was created as a “sham.” Each was originally funded by a Rural Electric Administration (“REA”) loan based upon a finding by REA, an agency of the United States Department of Agriculture, that the loan would be used to extend telephone service to persons in rural areas. 7 U.S.C. § 922.

¹⁴ The Commission notes that the structure and governance of cooperatives “make it highly unlikely that rural telephone cooperatives would be able to participate in the types of sham transactions the rule is designed to protect against.” *Order* at para. 15 (citations omitted).

¹⁵ Irrespective of year-to-year changes in the tax treatment of non-member revenues, the cooperative’s revenues from services to members, its primary function by law and fact, are not subject to federal income taxation.

not only irrelevant but ill-suited as an objective standard for weeding out “shams” because, in this case, it would exclude Petitioners, and, more generally, other legitimate cooperatives despite the Commission’s recognition that, other than to deter shams, the attribution criteria should not apply to rural telephone cooperatives.¹⁶

The objective and demonstrable criteria related to cooperative organization, governance and purpose are subject to examination to determine whether abuse is occurring. The Petitioners note that if a cooperative organization is appropriately organized under state law, abuse is most unlikely because there are no investors for whom any front would allow either clandestine control or the siphoning of profits. For example, loss of recognition as a cooperative at the state level would clearly render an entity ineligible for the exemption established by the *Order*.

III. Conclusion

Petitioners respectfully request that, notwithstanding their current ineligibility for full tax exemption of non-member income, their pending waiver requests be granted as consistent with the public interest, and consistent with the underlying purpose of both the attribution rules and policies designed to promote the participation of rural telephone

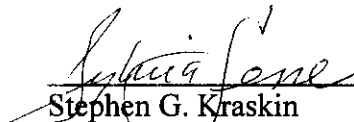
¹⁶ See *infra* nn. 4-5 and accompanying text.

companies in the provision of spectrum-based services.

Respectfully submitted,

CABLE & COMMUNICATIONS CORPORATION
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June 9, 2003

CERTIFICATE OF SERVICE

I, Naomi Adams, of Kraskin, Lesse & Cosson, LLC, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Petition for Reconsideration" was served on this 9th day of June, 2003 by first class, U.S. mail, postage prepaid or by hand delivery to the following parties:


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